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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Policies and Rules Concerning)
Children's Television Programming)
)
Revision of Programming Policies)
for Television Broadcast Stations)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 93-48

To: The Commission

COMMENTS OF
TRIBUNE BROADCASTING COMPANY

Charles J. Sennet
435 North Michigan Avenue
Suite 2010
Chicago, Illinois 60611
(312) 222-4121

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SUMMARY

Tribune Broadcasting Company welcomes the Commission's decision to re-visit the Children's Television Act. Tribune believes the Commission should use this opportunity to refine its rules and clarify its expectations in a number of ways:

- The Commission should underscore that general-interest programming can and does serve the educational and informational needs of young viewers. It should be accorded full weight in license renewal assessments.

- "Core" programming should be defined as programming which the licensee believes, in the exercise of good-faith judgment, is specifically designed to address the educational and informational needs of children 16 and under. The Commission should eschew any definition that attempts to measure and then accord "credit" to a program based on its "educational" value as compared with its "entertainment" value. Such an effort would require the Commission to make impermissible judgments about program content, and would be unworkable in any event.

- Full "credit" should be accorded short-segment programming. It is cheaper and easier for stations to produce, and is likely to capture the attention of children who may not care to tune in for long-form educational/informational programs.

- Any program aired at a time when there is a meaningful (more than *de minimis*) number of children in the audience should be given full credit.

- Broadcasters should not lose "credit" for failing to air locally-produced children's programming. Encouraging the

development of nationally distributed children's programs is in the best interest of stations and their viewers.

- The Commission should adopt a policy statement establishing a "safe harbor" which, if met, would render a license renewal application safe from challenge on children's programming grounds. The safe harbor should be set at one hour per week of regularly-scheduled "core" programming. In addition, the policy statement could require one hour of other programming (including short-segment and general-audience programming) that serves children's developmental needs as defined in the Act. No distinction should be drawn between weekday and weekend programming. Failure to meet the "safe harbor" would not warrant an adverse inference about the station's programming efforts; rather, it would simply subject the station's overall children's programming performance to careful review.

- Because of the lead time necessary for development of children's programming and station programming acquisitions, the safe harbor should not take effect before the start of the fall 1993 season.

- Any changes in interpretation or application of the Act that would materially affect a station's programming practices or its renewal expectancy, including application of the commercial-time requirements, should be effected through a notice-and-comment proceeding.

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Tribune Broadcasting Company ("Tribune") submits these Comments in response to the Notice of Inquiry in this docket, No. FCC 93-123, released March 2, 1993 ("Notice"). Tribune's seven independent television stations* and its television program distribution subsidiary all have a keen interest in the production and presentation of children's programming and in the issues raised in this inquiry.

Introduction

Tribune applauds the Commission for taking this opportunity to reflect on the Children's Television Act of 1990 ("the Act") and the need to give broadcasters a clearer understanding of their statutory obligations. Since a station's children's programming must, by law, be evaluated in the license renewal

* WPIX, New York; KTLA, Los Angeles; WGN-TV, Chicago; WPHL-TV, Philadelphia; WGNX, Atlanta; KWGN-TV, Denver and WGNO, New Orleans. Tribune Entertainment Company has been involved in the production and distribution of syndicated programming for children for many years.

context, the Commission owes it to licensees to make its expectations clear. This is simply a matter of due process.

On the other hand, the Commission must act carefully, as the Notice recognizes. If the Act is administered with a heavy hand, the Commission risks violating the express intent of Congress that broadcasters be given a great measure of discretion in complying. It risks stifling creativity and innovation in the production of programming that can educate, inform, enlighten and entertain. It risks creating a severe chilling effect that will send broadcasters fleeing to safe "copycat" programming that will fail to serve the goals of the Act and in all likelihood will be largely ignored by its intended audience.

And the Commission must not forget that if it yields to the temptation to push too hard or demand too much, it risks running afoul of the Constitution. President Bush refused to sign the Children's Television Act, taking the view that "[t]he First Amendment does not contemplate that government will dictate the quality or quantity of what Americans should hear -- rather, it leaves this to be decided by free media responding to the free choices of individual consumers." Statement by the President, H.R. 1677, Oct. 17, 1990. "Dictate" is something the Commission must resist the temptation to do, even if means foregoing the opportunity to prescribe more and better programming. Congress wisely recognized that quality cannot be mandated, and that the creative process does not respond well to quotas. The Commission cannot hope to achieve what Congress knew could not be done.

Tribune recommends that the Commission clarify its expectations and give broadcasters a sense of what is expected of them. At the same time, Tribune urges the Commission to make deference to broadcasters' good-faith determinations its guiding principle. No broadcaster programming a station in good faith can claim to have met the Act's requirements with program fare consisting solely of "The Jetsons," "Teenage Mutant Ninja Turtles" or "G.I. Joe." The Commission need not regulate as if this were the case.

I. WHAT PROGRAMMING WILL SATISFY A STATION'S OBLIGATIONS UNDER THE ACT?

A. The Statutory Requirement and General-Interest Programming.

The Commission's analysis must begin with the Act itself. The Act directs the Commission, in reviewing television license renewal applications, to consider the extent to which the licensee has served the educational and informational needs of children

through the licensee's overall programming, including programming specifically designed to serve such needs.

47 U.S.C. § 303b. The licensee's "overall programming" is to be considered by the Commission, not simply those programs that are intended to serve children's educational and informational needs:

The Committee believes that a broad range of programming can be used to meet the standard of service to the child audience required by this section. The Committee notes that general purpose programming can have an informative and educational impact [citation] and thus can be relied upon by the broadcaster as contributing to meeting its obligation in this important area.

S. Rep. No. 101-227, 101st Cong., 1st Sess. at 23 (1989).

Drawing on the legislative history, the Commission adopted a broad definition of educational and informational programming, which Tribune urges the Commission to retain. See Note to 73 C.F.R. § 73.671 ("programming which furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs." This definition fits all programming that meets the statutory requirements.

The Commission, thus, can and must give broadcasters "credit" for meeting the educational and informational needs of their child audiences through general-audience programming.

~~There is nothing in either the Act or common sense that warrants~~

promoted in advance so viewers can plan to see them, and more likely to have better production values and bigger production budgets.

The Commission must not discount the importance of these programs by selecting the label of "core programming" for programs that are specifically designed to meet children's educational and informational needs. Good programming designed for all viewers should be entitled to plenary credit under the Act. It should not be given short shrift because it meets the needs of adult viewers and young people at the same time.

B. "Core" Programming.

The statutory language quoted above and the legislative history cited above both make clear that Congress had two types of programming in mind when it required the FCC to assess children's programming as part of the license renewal process. Programming "specifically designed" to meet the educational and informational needs of children is a subset of the more general class of programming that addresses children's developmental needs.

The Notice refers to this sort of programming as "core" programming. Tribune has no objection to this terminology, although as we have just shown, programming that does not fit this definition should not be treated as irrelevant or unimportant.

The Notice suggests that "core" programming be defined as programming whose "primary objective" is educational and informational, "with entertainment as a secondary goal." Id.,

¶ 8. Alternatively, the Notice continues, "core" programming should be regarded as programming whose "explicit" purpose is to serve educational and informational goals, with the "implicit purpose of entertainment, rather than the converse." Id.

Tribune is not nearly so sanguine as the drafters of the Notice that this proffered definition will "avoid definitional problems." Id. What is the "primary objective" of a fairy tale? Of a story that teaches a lesson in personal development by frightening the viewer for a moment, or making her laugh? Of a program that teaches new words or concepts through song? Of a game show that teaches and entertains at the same time?

Tribune submits that the definition of "core" programming suggested in the Notice is unworkable and would require the Commission to make impermissible judgments about program content. Among other things, it suggests that a program that tries to educate and entertain in equal measure would not qualify.* The Commission should not put itself in the position of deciding what "objectives" predominate in the mind of a program producer.

The Commission should adopt a simple definition of "core" programming. It is programming which the licensee believes, in the exercise of good-faith judgment, is specifically designed to address the educational and informational needs of children 16 and under. This may be obvious from the content of a program (e.g., an educational special). Alternatively, the

* The best teachers are those who can make education interesting and entertaining at the same time.

station should be entitled to reasonably rely on the representations of producers, networks and program syndicators as to whether a program is designed to address "core" needs. The Commission should go no further to inquire into motives, primary or secondary objectives, or literary analysis.

A station's good-faith determination about the educational or informational value of a program should be entitled to no less deference than its decision whether a political news program is "bona fide," or whether its public affairs programs are responsive to important issues in its community. Second-guessing by the Commission will be unproductive and will be beset by all of the problems faced by a board of censors: an unmanageable task and a chilling effect on innovative broadcasting.

As noted above, it is unlikely that any broadcaster would represent, in good faith, that a comedy program such as "The Flintstones" was specifically designed to educate and inform children. In any event, Tribune submits that the Commission could reject such an assertion without running afoul of the First Amendment. Thus, if footnote 15 of the Notice can be read to suggest that the "primary/secondary objective" test was designed to enable the Commission exclude programs such as "The Flintstones" and "The Jetsons" from the "core" programming definition, Tribune submits there is no need to adopt an unworkable definition for that limited purpose.

C. "Standard-Length" vs. Short-Segment Programming.

Departing sharply from conclusions reached in the original Children's Television Act rulemaking that is not yet

even two years old, the Notice places great emphasis on program-length offerings in suggesting how the Act's requirements may be met. For the first time, the Notice proposes to relegate short-segment programming to mere "secondary" importance. Id. ¶ 8.

subject. So-called "kids' club" segments, such as KWGN-TV's "2 Bits Club," perform this function. WGN-TV's "Bozo Show," a program that attracts a large audience with a "fun" format, employs a weekly "Clown About Town" segment that teaches young viewers about history and local landmarks. Program syndicators have also begun supplying professionally produced "interstitial" vignettes that educate and inform children between entertainment programs.*

There is nothing in the Act, the legislative history or in the professional literature that requires that educational and informational material be delivered in doses of 30 minutes or more. The Commission should spur innovation and local programming by encouraging short-segment programming, and according it equal status to long-form programming at license renewal time.

D. Time of Day.

The Notice inquires whether the "scheduling" of standard-length programming should be taken into account in setting standards for license renewals. Id., ¶ 9. Press reports have suggested that the Commission may view certain early-morning hours as "too early" to be given credit under the Act.

Tribune again urges the Commission to defer to a broadcaster's good-faith judgment, while reminding it that children, particularly young children, tend to wake up early and camp out

* Tribune submits that the Commission should take a lesson from commercial advertisers (including political candidates) about the value of short-segment programming in delivering a message to an audience. Messages from 10 seconds to five minutes are the format of choice.

Local programming, particularly long-form programming, is expensive to produce. While television stations may have significant expertise at covering local news and public affairs, they may not have the internal resources to develop educational programming that children will watch. The Commission should encourage the development of syndicated and network programming meeting children's developmental needs. Nationally-distributed children's programming uses scarce production expertise more efficiently and gives producers the incentive to invest in programs that will gather a national following. Shows like WGN-TV's "Energy Express" and WTTG's "Not Just News" both started as local programs, but are now being syndicated nationally.*

Children will rarely know the difference between a local and a syndicated program, but they will be able to distinguish between a good program and a dull one. The Commission should not hinder the development of good programs by insisting that any portion of a station's "core" programming be locally produced.**

* Station groups or station consortiums may also choose to invest in the production of new children's programming. No station's credit under the Act should be diluted simply because a program was not produced in its own studios or by its own employees.

** Even network programs require an affirmative clearance on a station's part, and a decision not to substitute other programming. Thus, network and syndicated programs should be considered affirmative programming choices in the same manner that a local children's program would be.

II. SHOULD THE COMMISSION ADOPT QUANTITATIVE GUIDELINES?

A. The Commission Should Adopt a Policy Statement Incorporating a Safe Harbor.

The Commission could significantly relieve the sense of uncertainty and unease about what is expected of television stations by adopting a "safe harbor" which, if met, would ensure stations that their renewal applications could not be successfully challenged on children's programming grounds.

Tribune shares the recommendation of the Association of Independent Television Stations, Inc. (INTV) that the Commission adopt a "safe harbor" as part of a policy statement, calling for a minimum of one hour per week of "core" children's programming, defined as stated above, and one hour of programming, including short-segment and general-audience programming, that serves the educational and informational needs of children, as the Commission has expansively defined this term.* This level is well above any requirement the Commission has specified or applied to date. It doubtless would set a new minimum level of industry compliance. Broadcasters would be encouraged to do more in the form of short-segment programs, special programs and other innovative forms of program service.

Likewise, the policy statement should make clear that failing to meet the "safe harbor" minimum would not dictate denial of a license renewal or sanctions, but rather a full

* "We agree ... that Congress wished to give broadcasters the greatest possible flexibility and did not intend to exclude any programming 'that does in fact serve' children's needs." Reconsideration Order, supra at 5100-01 ¶ 41 (footnote omitted).

assessment of the station's overall children's program service, as required in the Act, including its non-"core" programming.

Tribune advocates the "safe harbor" approach with some reservation. After all, Congress specifically rejected legislation that would have imposed numerical children's programming quotas. In addition, the Commission concluded in its original rulemaking that any sort of quantitative guidelines would have a leveling effect, and that the legislative history did not contain any numerical prescriptions. Reconsideration Order, *supra* at 5100 ¶ 40. Nevertheless, if the Commission feels that the Act has mandated an increase in educational and informational programming, Notice at ¶ 1, broadcasters should be entitled to know how much more the government expects. As noted above, given the decisional significance this issue has at license renewal time, this is fundamentally a matter of due process. Television stations make programming decisions months and sometimes years in advance, and they are entitled to notice of a level of compliance which, if met over the course of a five-year license term, will justify a renewal expectancy.

There is no basis for distinguishing between weekday and weekend programming, for purposes of the safe harbor. Independent and Fox Network stations tend to carry more children's programs during the week, and affiliates of the other networks tend to air their children's schedules on weekends. There is no need to disrupt program schedules that now complement each other well. Since commercial television stations support their program offerings with advertising, they will tend to air programs in

time periods when there is the best chance that children will be in the audience.*

B. The Safe Harbor Should Be Fixed and Prospective in Application.

The Commission's policy statement should establish a minimum standard of compliance, which should remain fixed. There is no basis for an escalating minimum level of compliance in the absence of new legislation. While Congress may have intended to override market forces and require an increase in educational and informational programming, the statute does not require ever-increasing levels of this type of programming, particularly given the development of alternative video media for children.

The "safe harbor" should be available to any station that has met it, but it should not be used to draw a negative inference about a station's programming performance as to periods when the safe harbor did not apply. The safe harbor should be made effective October 1, 1993. There are two reasons for this view. First, despite somewhat disparaging references in the Notice as to the amount of "core" programming that has been listed in renewal applications filed to date, the Commission has never made known its quantitative expectations in this regard, if it had any. Indeed, the Commission certainly cannot fault a station for carrying no more than 30 minutes per week of regularly-scheduled "core" programming, considering that the Commission specifically rejected a requirement of regularly-

* In addition, requiring that programming be aired on weekdays would disrupt independent stations' pattern of Monday-Friday "strip" program scheduling and established viewing patterns.

scheduled programming in the original Children's Television Act rulemaking.

Second, as the Commission observed in the Notice, the program-production marketplace is just now beginning to catch up with the newly-created demand for educational and informational children's programming. Id., n.11. The program season starting in October 1993 will be only the third full season under the Act, and it is Tribune's perception that the production community did not fully comprehend the demand for "core" programming until the INTV/National Association of Television Program Executives conference in January of this year. Given the lead time required to produce a new series, the marketplace must be given time to develop. Fall 1993 is the earliest the Commission can reasonably expect these new programs to be available.

III. ANY FURTHER CHANGES IN CHILDREN'S PROGRAMMING POLICY AND RULES SHOULD BE EFFECTED THROUGH NOTICE-AND-COMMENT PROCEEDINGS.

There still are a number of uncertainties in application of the Children's Television Act. Many questions persist concerning interpretation of the commercial-time standards and the program-length commercial and host-selling policies, for example. Changes in the interpretation of the Act — which may alter the basis for a licensee's certification of compliance with the statutory commercial time standards, for example — can be of critical importance to a station. Tribune submits that if the Commission intends to make any further changes in its children's television rules or policies that would materially affect a station's programming practices or its renewal expectancy, including application of the commercial time standards, it should do so through a notice-and-comment proceeding.

Comments published in the trade press, remarks made at industry conventions, and rumors concerning changed interpretations of established policy all have circulated in recent months, creating disturbing uncertainty about application of the Commission's rules. Tribune urges that any change in policy be effected only upon proper notice and opportunity for comment, and that any such change that restricts or restrains prior practices be applied prospectively.

Conclusion

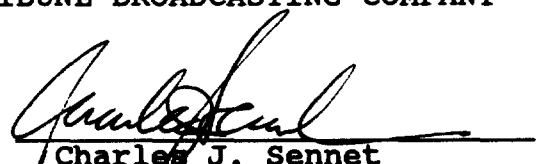
The Commission must be careful to regulate in this area with a light touch. It is all too tempting to be overprotective of children, but the Commission knows from experience that broadcasters respond best when they have ground rules they can understand and are permitted to innovate and compete.

An established level of satisfactory compliance, together with an accepted definition of "core" children's programming that accords due deference to a broadcaster's good-faith judgment as to the educational/informational merit of a program, will put the Children's Television Act on the right course. The Commission must also bear in mind that the Act is quite new. The marketplace has not yet adjusted to the demand for programming the legislation has generated. It is important to give the Act time to work, and not to react prematurely.

Respectfully submitted,

TRIBUNE BROADCASTING COMPANY

By


Charles J. Sennet
435 North Michigan Avenue
Chicago, IL 60611
(312) 222-4121

Its Attorney

Dated: May 7, 1993

EXHIBIT A

**Children Age 2-11 in the TV Audience
At Selected Program Hours**

New York

<u>Time Period</u>	<u>Monday-Friday</u>	<u>Saturday</u>	<u>Sunday</u>
6:00 a.m.	105,000	47,000	2,000
6:30 a.m.	138,000	76,000	13,000
7:00 a.m.	354,000	211,000	168,000
7:30 a.m.	575,000	349,000	280,000
8:00 a.m.	545,000	550,000	536,000
8:30 a.m.	402,000	732,000	482,000